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June 21, 2004

VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW – Lobby Level
Washington, D.C. 20554

Re: ***Notice of Ex Parte – CC Docket Nos. 93-193, 94-65, and 94-157***
Verizon Telephone Companies Petition for Reconsideration,
“In the Matter of Stale or Moot Docketed Proceedings”

Dear Ms. Dortch:

On June 21st, 2004, I, the undersigned, on behalf of SBC Telecommunications, met with Commissioner Michael J. Copps and Jessica Rosenworcel, Legal Advisor to Commissioner Copps, to discuss the above referenced proceedings. During the course of the meeting, we reiterated SBC’s legal positions as it reflected in its previous filings. SBC utilized the attached document as the basis for discussion.

Pursuant to 1.1206 of the Commission’s Rules, this letter is being filed electronically with the Commission.

Sincerely,

/s/ Gary L. Phillips

Attachment

cc (via electronic mail):
Commissioner Michael J. Copps
Jessica Rosenworcel

“RAO 20” TARIFF INVESTIGATION

I. *The Commission’s rules did not permit, much less require, LECs to deduct accrued OPEB liabilities from their rate bases.*

- The Commission’s rate base rules in effect in 1996 — 47 C.F.R. §§ 65.800-65.830 — gave clear and explicit direction on how LECs were to calculate their rate base and, in fact, established the *precise* formula for doing so:
 - § 65.800: “[t]he rate base *shall consist of* the interstate portion of the accounts listed in § 65.820 . . . , minus any deducted items computed *in accordance with* § 65.830.”
 - § 65.830(a): “The following items *shall be deducted* from the interstate rate base. . . . (3) The interstate portion of unfunded accrued pension costs (Account 4310).”
- The Commission twice held that its rules could not be interpreted to require deduction of OPEBs
 - *Rescission Order* ¶ 25: After noting that the Commission’s rules “define explicitly those items to be included in, or excluded from, the rate base,” the Commission held that the Bureau had exceeded its authority when it required LECs to deduct OPEBs from the rate base because the Bureau had “directed [an] exclusion[] from . . . the rate base for which the Part 65 rules *do not specifically provide*.”
 - Although the Commission stated, in vacating RAO 20, that it “base[d] [its] action solely on procedural grounds, and render[ed] no decision on the substantive merits of the ratemaking practices at issue,” *RAO 20 Rescission Order* ¶ 27, the Commission was not suggesting that under its existing rules it could require deduction of OPEBs. Instead, the Commission was explaining that it had not prejudged the substantive issue it was simultaneously teeing up in the NPRM: whether deduction of OPEBs *should be* required prospectively.
 - *Reconsideration Order*: If there were any doubt about the Commission’s reading of its rules in the *RAO 20 Rescission Order*, it was resolved definitively the following year in the *RAO 20 Rulemaking*.
 - *RAO 20 Rulemaking* ¶ 28: In rejecting MCI’s argument that section 65.830 of the Commission’s rules could be read to require deduction of accrued OPEB liabilities, the Commission held it was “not persuaded by MCI’s argument that the Commission can amend Part 65 through an interpretation,” because “[g]iving rate base recognition to OPEB in Part 65 would constitute a rule change.”

II. *There was no “Gap” in the Commission’s Rules*

- The Commission’s own prior interpretations of its rules preclude any claim that there was a gap in those rules.
- Both the *Rescission Order* and the *Order on Reconsideration* state that the Commission’s rules specify what should and should not be in the rate base
 - *Rescission Order* ¶ 25: “Sections 65.820 and 65.830 of our rules **define explicitly** those items to be included in, or excluded from, the interstate rate base.”
 - *Both orders*: “The rate base rules, codified at 47 CFR §§ 65.800-830, list the Part 32 accounts that **are to be included in and excluded from the rate base** that telephone companies use to calculate their interstate costs.”
- The *Suspension Order* initiating this investigation also recognized that the rules were dispositive because that order sought comment only on the appropriateness of the LECs’ rate base treatment of OPEBs “**under existing rules.**” Had the Commission believed that there was a gap in the rules, it would have framed the issue more broadly.
- The fact that the accounting rules for OPEBs changed after the Commission promulgated §§ 65.800-65.830 does not create a “gap” in those rules that the Commission can fill through interpretation
- When the text of a regulation is unambiguous, courts will enforce the plain meaning of the regulation, even if the agency might have adopted a different rule had it considered other facts
 - Thus, in *Grider v. Cavazos*, 911 F.2d 1158 (5th Cir. 1990), the court rejected a claim that a regulation should be interpreted to treat student loans differently from other debts, because [unlike other debts, student loans]do not come into the hands of the government until and unless they are delinquent.” *Id.* at 1162. While acknowledging that had the drafters considered this fact, they might have treated student loans differently, the court held “[i]t suffices, however, that the drafters of the Regulation did not do so. . . . And try as we might, we fail to see how the Regulation could be viewed as ambiguous.” *Id.* at 1162-63.
 - Similarly, even assuming the Commission would have required deduction of both pensions and “other long-term liabilities,” including OPEBs, if OPEBs had been accrued and included in Account 4310 when the Commission promulgated §§ 65.800-65.830, the fact remains that the Commission did not adopt such a rule — and the rule it adopted is unambiguous.

- Moreover, the regulatory history of § 65.830 demonstrates that the Commission made a conscious distinction between pensions and other long-term liabilities, even if it was not thinking specifically of OPEBs.
 - In its 1986 NPRM, the Commission proposed a rule that would have required deduction of *all* zero-cost funds, which (on the Commission's view that OPEBs are zero-cost funds) would have required deduction of *both* pensions *and* other long-term liabilities analogous to pensions. (2 FCC Rcd 332, App. A (1986))
 - But the rule the Commission adopted singled out pensions for deduction, and did not require carriers to deduct any other long-term liability including in Account 4310. (3 FCC Rcd 269, App. B (1987))

III. The Commission may not change its rules in a tariff investigation.

- In investigating a price cap LEC's tariff, the Commission assesses the tariff against the Commission's *existing rules*.
 - Tariff investigations are not the proper proceedings for enacting new rules.
 - *Access and Divestiture Tariff Order*: Explaining that its tariff investigation was "an investigation of the lawfulness of the filed access tariffs and their compliance with our access charge rules" and that "[p]roposals to change or reconsider those rules should be submitted in a new rulemaking petition." 101 F.C.C.2d 911, ¶ 17 n.23 (1985).
 - *Special Access Tariffs Order*: "Section 204(a) are rulemakings of particular applicability," in which the Commission "merely applies the obligations imposed by the statute or previously adopted Commission rules to particular carrier conduct." 5 FCC Rcd 4861, ¶¶ 7-8 (1990).
 - The Commission's obligation to apply its existing rules in tariff proceedings is a specific application of the general rule that an "agency must indeed follow its own regulations while they remain in force." *Voyageurs Region Nat. Park Ass'n v. Lujan*, 966 F.2d 424, 428 (8th Cir. 1992).
 - The D.C. Circuit has applied this same rule in reversing a Commission ruling in a tariff investigation.
 - In an earlier investigation of tariff filings involving OPEBs, the court explained that, because the Commission's "criteria for exogenous cost treatment constituted a rule," "the Commission was bound to follow those [criteria] until such time as it altered them through another rulemaking." *Southwestern Bell Tel. Co. v. FCC*, 28 F.3d 165, 169 (D.C. Cir. 1994).

- Therefore, in reviewing the Commission’s ruling on the lawfulness of the LEC tariffs, “the key question” was “whether the FCC adhered to those criteria in evaluating the LECs’ filings.” Because the court “conclude[d] that it did not,” it reversed the Commission’s ruling. *Id.*
- In fact, the D.C. Circuit held that, “whatever the intrinsic merits” of the Commission’s policy reasons for “rejecting exogenous cost treatment” for OPEBs, “the Commission is free to consider them as a basis for *amending* its current rule, not for concocting a new rule in the guise of applying the old.” *Id.* at 173.
- AT&T has attempted to distinguish this case on the ground that the Commission did not claim it was exercising rulemaking authority in the tariff investigation at issue. Nothing in the decision, however, suggests that the result would have been different if the Commission had much such a claim. To the contrary, the court’s clear holding, consistent with basic principles of administrative law, is that the Commission *may not* change its rules in a tariff investigation no matter how it packages that rule change.
- Although the Commission cannot amend its rules in the course of a tariff investigation, it can interpret those rules, insofar as they are ambiguous.
 - *Access Charge Reform Tariff Order*: Because the Commission did “not specify the precise steps that price cap LECs must take to implement [a] permitted revenue methodology for each exogenous adjustment,” it “emphasize[d] that price cap LECs must implement this methodology in a manner consistent with their obligation . . . to tariff just and reasonable rates” and stated that it would “carefully review the . . . methodology” each LEC selected. 13 FCC Rcd 14683, ¶ 89 (1998).
 - *1997 Annual Access Tariff Filings*: “Under price cap regulation, common line rates that mathematically comply with the Part 61 price cap formulae may nevertheless be unjust and unreasonable if they are developed using unreasonable per-line BFP revenue requirement forecasts.” 13 FCC Rcd 10597, ¶ 7 (1998)
 - The Commission had “not, in the past, prescribed in advance any particular methodology for use by the LECs in preparing their BFP revenue requirement forecasts.” 13 FCC Rcd. 3815, ¶ 76 (1997)

IV. *Even if the Commission could change its rules in a tariff investigation – and the law is clear that it cannot – it could not do so here because the Suspension Order gave no notice of a possible rule change.*

- Even if the Commission could amend its rule through a tariff investigation, it provided no notice that it was contemplating doing so.

- Instead, in the order setting the 1996 tariff filings for investigations, the Bureau indicated only that the investigation would determine the lawfulness of the tariffs “under *existing* rules.” Memorandum Opinion and Order, *1996 Annual Access Tariff Filings*, 11 FCC 7564, ¶ 19 (Comm. Carr. Bur. 1996) (emphasis added). .